87-808 (1)

CASE NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SANDRA SAPP FLETCHER, SYLVIA SAPP VANDERGRIFT AND JAMES WINSTON SAPP, JR.,

Petitioners,

vs.

ESTATE OF HELEN SAPP CHRIST,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

I

Does Fourteenth Amendment due process prohibit a judgment upholding the will of an adjudicated incompetent where no competent evidence of Testatrix' knowledge of the extent of her bounty exists and the drafting attorney was attorney for the primary beneficiary when the will was drafted and executed?

II

Does Fourteenth Amendment due process prohibit a judgment upholding the will of an adjudicated incompetent entered in the face of presumptions of continued incompetency and undue influence, neither of which was overcome by competent evidence as a matter of law.

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The (R____) references are in conformity with the designations in the Florida Appellate Court except that petitions for rehearing and orders denying them are kept without such designations in the Appellate Court with the record on appeal returned to the trial court.

TABLE OF AUTHORITIES

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The judicial opinion and findings of fact of the trial court is part of the record on appeal in the District Court of Appeal of Florida, First District, docketed as case number BQ-385 and is set out in full in the Appellant's Appendix in that court. It is also in the trial court in the Circuit Court of the Second Judicial Circuit, in and for Gadsden County, Florida. In Re: Estate of Helen Sapp Christ, deceased, Case no.: 83-339-PR.

The order affirming the trial court's entry of judgment, Per Curiam, is reported as Fletcher v. Estate of Christ, 508 So2d 1239.

JURISDICTIONAL STATEMENT

The Judgment sought to be reviewed was dated and entered Per Curiam, Affirmed, without opinion, on June 1, 1987, (A 43) a Motion for Rehearing and Motion for Rehearing en banc was filed on the 16th of June, 1987.

A Per Curiam affirmance without opinion, as this Court recognized in Hobbie v. Unemployment Appeals Com'n of Florida, ____ US____, 107 S Ct 1046 (1987), had the effect of precluding Florida Supreme Court Review.

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States

Article XIV, Section 1
(Fourteenth Amendment)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FLORIDA STATUTES

Section 732.501, Florida
Statutes, 1980

"who may make a will - Any person 18 or more years of age who is of sound mind may make a will."

Section 732.5165, Florida Statutes, 1980

"Effect of fraud, duress, mistake, and undue influence - A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons."

STATEMENT OF THE CASE

The decedent, HELEN SAPP CHRIST (Helen), had a brother, Dr. James Winston Sapp, Sr., now deceased, and a sister, Rosalie Morleland, (Rosalie) whose son, Hugh Moreland (Hugh) is the primary beneficiary of the will of Helen. Rosalie also has a daughter, Marjorie Morgan. (Contestants' Exhibit 2)

Dr. James Winston Sapp, Sr. left surviving him Sandra Sapp Fletcher, Dr. James Winston Sapp, Jr. and Sylvia Sapp Vandergrift. (Contestants' Exhibit 2) These surviving children were the Contestants below and Petitioners here.

Helen's husband, Harold, was deceased at the time the will

was executed. She had no children. (Contestants' Exhibit 2)

Helen had a long history of mental illness and shortly before and after Harold's death, she spent much of her time in nursing homes. (R 215-218; 159, 163)

While Helen was in a Georgia nursing home in the late 70's after Harold's death, she was visited by Attorney John Shaw Curry at the insistance of Hugh and Rosalie, both of whom accompanied Mr. Curry to the nursing home. (R 197-198; R 72)

The purpose of this visit was to convince Helen that a guardianship should be established for her. (R 197)

Mr. Curry recalled that she was all for it and as a result,

guardianship proceedings were begun and concluded on the 6th day of November, 1978, ending in Hugh being appointed as Guardian of Helen's property with Mr. Curry as his attorney. (Contestants' Exhibit 2)

Some weeks prior to the 22nd day of April, 1980, Rosalie, after Hugh talked to her about Helen needing a will and she having told Helen the law required it, (R 168) drove Helen to the office of Attorney Curry where a will drafting conference was held among Helen, Rosalie and Mr. Curry.

On the 22nd day of April, 1980, Helen executed the contested will in the presence of Dr. Reddick, Attorney Curry and Margaret Suber; Dr. Reddick and Margaret Suber being attesting

witnesses. The will bequeathed $500.00 each to the three Petitioners and to one other niece with the rest going to Hugh; over $100,000.00.

Just who else was there, from the testimony, is hopelessly conflicting; Margaret Suber thought Rosalie was there (R 153) and sitting to the right. (R 155) Dr. Reddick was not sure if Margaret Suber was there but thought Samuel Thompson was there. (Respondent's Exhibit 2, Page 17)

Helen died on the 14th day of September, 1983. (R 3)

On the 21st of October, 1983, after Helen's death, Hugh petitioned through his attorney, Mr. Curry, for letters of

administration and for his appointment as personal representative under the will. (R1)

On January 1st, 1984, the Petitioners' filed their petition for an order revoking probate and declaring the will invalid for lack of testamentary capacity and for the exercise of undue influence in procuring the will. (R 28)

A non-jury trial was held on the 9th of October, 1986 (R 133-249) before the Honorable Ben C. Willis, who entered a Final Judgment adverse to Contestants on the 13th day of November, 1986. (A1; R 119-129)

Notice of Appeal was timely filed on the 11th day of November, 1986, in the District Court of Appeal of Florida, First District. (R 132)

On June 1, 1987, that Court Per Curiam affirmed, without opinion, the trial court's judgment. (A43)

A Motion for Rehearing and for Rehearing En Banc was filed on the 16th of June, 1987, and was denied without opinion on the 6th of July, 1987. (A44)

The Constitutional issue under the Fourteenth Amendment was first raised in the Motion for Rehearing and for Rehearing En Banc in paragraphs 8, 11 and 12.

REASONS FOR GRANTING THE WRIT

This case is a chronical of a woman who became the victim of the very laws and procedures designed to protect her.

The actors have already been identified in the Statement of the Case, supra.

The Attorney, Mr. Curry, represented three people during the passage of events. He represented Hugh and Rosalie in convincing Helen to submit to the appointment of Hugh as her guardian, he represented Hugh as guardian of Helen's property, he represented Hugh as personal representative of Helen's deceased husband's estate and he represented Helen at the same time in drafting and procuring

the execution of Helen's will in which Hugh became the primary beneficiary.

The will contest proceeded upon an agency theory; that Hugh had two agents, his mother Rosalie and his attorney, Mr. Curry.

It was through this agency artifice that Hugh procured the execution of the contested will.

After Hugh became Helen's guardian he suggested to Rosalie that Helen should make a will. According to Rosalie, the reason given Helen that she should make a will was because it was the law that she have a will. (R 165)

John Shaw Curry was never asked if the law required one to

have a will but stated that had he been asked he would have advised "no". (R 212) The only reasonable inference from the evidence is that Hugh told Rosalie Helen should make a will because it was the law, to ensure that Helen make a will.

Following Hugh's suggestion, Rosalie took Helen to see Mr. Curry preparatory to preparing the will and told John Shaw what Helen wanted in the will. (R 162-164)

John Shaw Curry stated that he never told Hugh about Helen's will or its terms. (R 213) This is quite immaterial because at the times material his client was Hugh, the primary beneficiary. (A 18-23; Contestant's Exhibit 1, Petitions in the Estate of Harold

Christ and in the Guardianship of Helen Sapp Christ) Under such circumstances of dual representation, the law irrebuttably presumes the confidences between Helen and John Shaw Curry were passed to Hugh. Sears, Roebuck & Co. v. Stansbury, 374 So2d 1051 (Fla. 5th DCA 1979).

In addition to all this, Mr. Curry admitted he had prepared the Affidavit of Dr. Reddick swearing to the testamentary capacity of Helen before the signing of the will. (Emphasis supplied) (R 211)

This is only susceptible of the inference that Dr. Reddick had predetermined Helen's competency before the execution of the will.

The case of Haynes v. First National State Bank of N.J., 432 A 2d 890, is very similar. There the New Jersey Supreme Court was faced with an issue it described as:

"The major issue presented is whether the will is invalid on the grounds of 'undue influence' attributable to the fact that the attorney, who advised the testatrix and prepared the testamentary instruments, was also the attorney for the principal beneficiary, the testatrix's daughter, in whom the testatrix had reposed trust, confidence and dependency."

The trial court had held that the circumstances had created a presumption of undue influence but the presumption had been rebutted.

The New Jersey Supreme Court in reversing stated:

"[6] In imposing the higher burden of proof in this genre of cases, our courts have

continually emphasized the need for a lawyer of independence and undivided loyalty, owing professional allegiance to no one but the testator."

The Florida case of In Re: Estate of Carpenter, 253 So2d 697 (Fla. 1974) was cited as authority.

The Final Judgment, citing In Re: Estate of Carpenter, supra, set out the six criteria for determining undue influence in undue influence cases.

It will be shown that in all but one was accomplished through Hugh's agents:

Criteria (1): "Presence of beneficiary at the signing of the will." Hugh's agent and attorney, Mr. Curry was there.

Criteria (2): "Presence of beneficiary on those occasions when

testator expressed desire to make a will." Conceded that there is no evidence Helen voluntarily expressed any such desire.

Criteria (3): "Recommendation by beneficiary of an attorney to draw a will." Though ruling there was no undue influence, the final judgment concedes this criteria was met. (A 38)

Criteria (4): "Knowledge of contents of will by beneficiary prior to execution." As earlier pointed out this knowledge was irrefutably imputed to Hugh through his attorney.

Criteria (5): "Giving instructions by beneficiary on preparation of will." This <u>again</u> was done by Rosalie at the will drafting conference. (R 162-164)

Criteria (6): "Safekeeping of will by beneficiary subsequent to execution." Here again, the will was kept by Mr. Curry, Hugh's attorney.

All of the Criteria but Number (2) were met by the evidence in this case.

Undue influence need not be exercised by the claimant under a challenged will, but by another on his behalf as in the case of In Re: Reid's Estate, 138 So2d 342 where attorney/beneficiary had a second attorney procure and prepare the will and a third attorney to see to its execution. Their actions were imputed to the beneficiary and the will was denied probate because of the beneficiary's undue influence exercised by others.

Regarding the presumption of continuing incompetency, the Final Judgment noted that attesting witness Dr. Reddick stated that Helen had been lucid and competent many months before executing the will.

However, the conclusion of Dr. Reddick that Helen understood the nature of what she was doing is based upon Dr. Reddick's evaluation of her understanding that she had a prior will, a supposed fact created by Dr. Reddick's leading question to Helen when he asked her if she understood that this represented a departure from what her will had been previously. Clear proof of her failure to comprehend the nature of the proceeding since she had no prior will. (R 164)

Obviously, she could not have understood the provisions of an alleged prior will which did not exist no matter what she compliantly indicated to Dr. Reddick, Attorney Curry, Margaret Suber, and perhaps, Rosalie.

Significantly, there is no evidence that this misapprehension of Dr. Reddick was corrected by Rosalie or Attorney Curry at the time the will was executed leaving Helen under the impression she had a prior will.

Look at the real nature and extent of Helen's property:

Helen had around $100,000.00 in trust.

Helen had Real Estate consisting of a house and lot.

Helen had personalty other than cash, consisting of household goods.

The record is absolutely devoid of even an inference that Helen even knew she owned any real estate at the time of executing the will.

"Personal property" includes all property that is not real property.

The nature of this class of property can vary with physical descriptions, number of items and values.

The evidence is uncontroverted that Helen owned such property but, again, there is a complete dearth of evidence of Helen's knowledge of this class of property other than "money" at the

time of the execution of the will. There is evidence that much of Helen's personalty, such as the china and silverware in her home, were divided by Rosalie and Hugh BEFORE HELEN DIED. (R 234)

This is subject to the strong inference that the right to such items would reside in Hugh after Helen died, a knowledge irrebuttably imputed to Hugh through his attorney from his dual representations.

Therefore, except for that statement to Helen that she should understand that she had a "lot of money in the bank" there is absolutely no evidence that she knew the nature of her other property consisting of real estate and personal property.

Findings of fact of a judge in a case tried without a jury will not be disturbed except when such findings are contrary to the manifest weight of the evidence or contrary to the legal effect of the evidence. Obviously here the critical findings of the trial judge were erroneous for both reasons. DIXSON v. KATTAL, 311 So2d 827 (Fla. 3rd DCA 1975), GOLDSTEIN v. GOLDSTEIN, 310 So2d 361 (Fla. 3rd DCA 1975), NORTHWESTERN NAT. INS. CO. v. GENERAL ELEC., 362 So2d 120 (Fla. 3rd DCA 1978).

Hugh relies upon self-serving responses to overcome the presumptions against him as follows:

Q. Did you use any kind of persuasion, duress, force,

coercion, or artful or fraudulent contrivances to get her to make or sign a will?

A. No, sir. (R 172)

Q. What did you observe Helen's mental condition to be in 1980?

A. ...as far as her mental condition, I never knew her mental condition to be anything other than normal.

Q. Did you ever see her when you considered her not to be lucid or not understand what was going on around her?

A. No, sir, I don't believe I did. (R 175)

Q. Did you ever use any undue influence on Helen to get her to sign a will or to do anything for you?

A. Oh, no, sir. No, never.

Q. Did you try to use any kind of influence on Helen to make her do anything for you or to make a will.

A. No, sir. (R 175)

(Emphasis supplied)

Yet, Hugh joined in the petition to have Helen declared incompetent

and, as the trial judge correctly pointed out, instigated the trip to the Thomasville, Georgia nursing home to discuss the matter of a guardianship with Helen in company of his attorney, Mr. Curry. (R 197-198)

After that trip Mr. Curry then undertook to represent Rosalie Moreland and Hugh Moreland as Petitioners and Hugh as Guardian respectively, to have Helen declared incompetent for "mental incompetence". That petition reads:

"4. Your Petitioner variably believes that Helen Sapp Christ is mentally incompetent and because of her mental disability is incapable of caring for or managing her property and accordingly is likely to dissipate, lose or not make claim for property she presently owns or might be legally entitled to."

which Petition specifically was sworn to by Hugh and Rosalie.

So Hugh, though testifying under oath at trial that he had never seen Helen when she wasn't lucid and able to understand what was going on around her, swore under oath that Helen was mentally incompetent, incapable of managing her own affairs.

A rather drastic procedure when a power of attorney would have sufficed without the incompetency stigma. Or, perhaps, establishment of a voluntary guardianship.

The final judgment, the affirmance of which brings Petitioners to this Court, is devoid of any evidentiary foundation and therefore violate

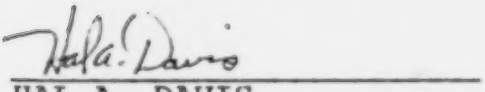
the due process clause of the Fourteenth Amendment. In addition, the conclusions of law and fact fly in the face of Sections 732.501 and 732.5165, Florida Statutes 1980, since upholding of the will is without support. Petitioners do not feel that it stretches the rationale of North Carolina v. Pearce, 395 US 711, to apply it to this type of civil proceeding. The appearance of unfairness to permit such a judgment to stand without any substantial proof and in the face of legal presumptions totally unmet, is obvious.

The treatment of the now deceased Helen cannot be salved but it can be remedied as to her heirs.

The Court of Appeal of Florida, First District, has

decided an important question of federal law, that has not been settled by this Court and has sanctioned such a departure from due process as call for a decision by this Honorable Court.

Respectfully Submitted,



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87-808 (2)

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

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A P P E N D I X

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR GADSDEN COUNTY, FLORIDA.

CASE NO.: 83-339-PR

IN RE: ESTATE OF HELEN SAPP
CHRIST,

Deceased.

FINAL JUDGMENT

This cause is before the Court on the petition of Sylvia Sapp Vandergrift, James Winston Sapp, Jr. and Sandra Sapp Fletcher to revoke the probate of the Will of Helen sapp Christ, deceased, and the Court having considered the said petition, the response of the personal representative, Hugh Moreland, thereof, and having heard and examined the evidence produced

at the trial together with argument and memoranda of counsel for the respective parties, and being otherwise advised, it is:

ORDERED AND ADJUDGED:

1. Helen Sapp Christ, a widow and without a child or other lineal descendents, executed a will in April 1980 in which the Respondent, Hugh Moreland, was named personal representative. Mrs. Christ died in 1983 and the will was offered for probate by Mr. Moreland and orders were entered admitting it to probate and appointing Mr. Moreland personal representative. Mrs. Christ's nearest of kin were her sister, Mrs. Rosalie Sapp Moreland, and her nieces Sylvia Sapp Vandergrift, Sandra Sapp Fletcher and Marjorie

M. Morgan, and her nephews Hugh Moreland and Dr. James Winston Sapp, Jr. Mr. Moreland and Mrs. Morgan are the children of Mrs. Rosalie Sapp Moreland. Dr. Sapp, Mrs. Vandergrift and Mrs. Fletcher are the children of Dr. James Winston Sapp, Sr., a brother of Mrs. Christ who predeceased her. The will bequeathed to Mrs. Vandergrift, Dr. Sapp, Jr., Mrs. Fletcher and to Mrs. Morgan, each, the specific sum of $500.00. Mr. Moreland was made the residuary legatee and nominated personal representative.

2. The assets of her estate consist of the equivalent of something over $100,000.00 in bank deposits or the equivalent in liquid funds and her home and other miscellaneous items.

3. The contestants, all being the children of the late James Winston Sapp, Sr. assert that the will is ineffective because of lack of testamentary capacity of the testatrix at the time of execution, and also because of undue influence on testatrix by the principal beneficiary, Hugh Moreland.

4. The issues before the Court in this proceeding are:

A. Whether the testatrix possessed the minimum testamentary capacity in order for her will to be valid; and
B. Whether Hugh Moreland, the Principal beneficiary under the will, exerted undue influence on the testatrix in the execution of the will.

5. The pertinent facts seem to be as follows. Helen Sapp Christ was married to Harold Christ who died in 1978. This seems to have been a troubled marriage creating a number of problems for her. During the marriage some of the property Mrs. Christ inherited from her father was used by her husband in some enterprises in Kansas and after Mr. Christ's death, legal action in behalf of Mrs. Christ resulted in a recovery of some sixty thousand or more dollars which was deposited with the Capital City First National Bank to provide assets and income for Mrs. Christ.

6. Mr. John Shaw Curry was the attorney who prepared and supervised the execution of Mrs.

Christ's will. He had been her attorney in several capacities since he started practicing in 1971. In the mid-seventies she consulted with him about instituting divorce proceedings, but a reconciliation prevented this from being pursued. Sometime in the 1970's he visited her at a nursing home in Thomasville, Georgia. This trip was initiated by Mr. Moreland or his mother. Her husband had taken a considerable portion of her property to Kansas. Mrs. Moreland and Hugh Moreland had become concerned for her as she seemed physically and mentally impaired to handle her business affairs, and steps to have a guardian appointed for her were discussed. Mr. Curry consulted on this matter with Mrs.

Christ at the Thomasville nursing home. She agreed to the proceeding and seemed lucid and comprehending at the time. Proceedings were thus instituted in the Circuit Court of Gadsden County in which two physicians were included in the panel to examine her and make report of findings. The report filed found that she was mentally and physically impaired to the extent that she could not properly manage her property and business affairs. An order adjudging her incompetent was entered in 1978 and Mr. Hugh Moreland was appointed guardian of her estate. Mr. Curry says he saw her at the incompetency hearing and that she understood what was being done and agreed that she needed help in her personal and business affairs.

7. After Mr. Moreland's appointment as guardian he directed Mr. Curry to take legal steps to pursue claims in behalf of Mrs. Christ in Kansas to recover the money or property Mr. Christ had taken there. This ultimately resulted in recovering something in excess of $60,000 which was deposited in a trust account in Capital City First National Bank for Mrs. Christ's benefit.

8. Upon Mr. Christ's death in 1978, Mr. Moreland was appointed personal representative of his estate, as Mrs. Christ was his sole heir.

9. Sometime prior to April 1980, Mrs. Christ became a patient at the Gadsden nursing Home, which is a facility to give

care to persons of advanced age or enfeeblement who are unable to care for themselves adequately.

10. Mr. Moreland arranged to have some repairs and maintenance done on Mrs. Christ's home in Havana. He and his mother were frequent visitors to Mrs. Christ. Mr. Moreland at some time mentioned to his mother the desireability of Mrs. Christ making a will. His mother talked to Mrs. Christ about it and seemed under the impression that the law required the execution of a will. Mrs. Moreland or Mr. Moreland made arrangements for Mrs. Christ to talk to Mr. Curry with a view to drawing a will for Mrs. Christ. Mrs. Moreland, in her car, drove Mrs. Christ to a parking space near

to Mr. Curry's office. As it was necessary to climb a steep staircase to reach Mr. Curry's office from the street and the two ladies were in advanced age and frailty, Mr. Curry came down and talked to them while they remained in the car. He discussed the terms of the will which Mrs. Christ desired. Mrs. Christ stated clearly what she wanted and said she wanted Hugh Moreland to get most of it. She was told that she had "a lot of money" and she seemed to know generally the extent of her property. Mrs. Moreland did participate in the discussions. Mrs. Christ was somewhat impaired in her hearing but Mr. Curry stated she appeared to fully understand

the significance of a will and the effect of the provisions she directed to be included.

11. Mr. Curry was of course aware that Mrs. Christ had been adjudged incompetent and that Mr. Moreland was her guardian. Dr. Hilliard R. Reddick was her physician and Mr. Curry contacted Dr. Reddick about her lucidity and Dr. Reddick was requested to contact Mr. Curry at a time when he felt Mrs. Christ was particularly lucid so that he could arrange to have the will which he was drawing to be again explained to her and executed if it appeared she wanted to do so. After several weeks, Dr. Reddick contacted Mr. Curry with the information that Mrs. Christ appeared to be fully cognizant and

arrangements were made for Mr. Curry to meet Mrs. Christ with Dr. Reddick at the Gadsden Nursing Home. Both Dr. Reddick and Mr. Curry conferred with Mrs. Christ. The portions of the will pertaining to the bequests and appointment of personal representative were fully read and explained and she clearly stated that this expressed what she wanted to do. Mrs. Christ was taken into the prayer room in a wheel chair where she signed and acknowledged the will with Dr. Reddick and Mrs. Margaret Suber, a licensed practical nurse employed by the nursing home, signing and attesting as witnesses. Mr. Curry stated that Mrs. Moreland was not present at the signing of the will but she may have been in the

building. Mr. Curry stated he was never in doubt that Mrs. Christ was fully lucid, aware of the extent of her property and the terms incorporated in the will fully comported with her wishes. After execution Mr. Curry retained the will in his possession.

12. Dr. Reddick executed a sworn written statement reciting facts indicating that Mrs. Christ was fully cognizant of the extent of her property and of those she desired to be the objects of her bequests.

13. Mr. Moreland was not present at any of the conferences relating to the will nor at its execution and the evidence indicates he was not aware of its provisions until it was offered for probate.

14. Testifying at the trial were Mr. Samuel A. Thompson and Mrs. Margaret Suber, the latter being an attesting witness to the will. Mr. Thompson, a retired Air Force officer, was administrator of the Gadsden Nursing Home at the time Mrs. Christ signed the will. He stated he knew Mrs. Christ as a patient, that she was friendly, but sometimes became upset, but always appeared to be aware of her surroundings and was positive in expressing her wants. He stated that in all his contacts she seemed to be lucid. Mrs. Suber, and LPN at the nursing home, knew Mrs. Christ as a patient there. She was slightly deaf but appeared lucid during her contacts with her. At the signing of the will she seemed

to be clear in her thinking and spoke with understanding of what was going on. She made references to the terms of the will and Mrs. Suber was aware of nothing unusual in the signing of the will.

15. Also testifying was Dr. Robert Wray, a board certified psychiatrist. He stated he knew Mrs. Christ when he treated her at Apalachee Mental Health Clinic in 1971-1974, where she appeared accompanied by her husband. She was treated with tranquilizers. She was a regressed, quiet woman with a condition diagnosed as schizophrenia in remission. He classified the basic illness as catatonic schizophrenia in which there would be little awareness of surroundings, but she would know

who the members of her family were. Hospital records indicated she was treated with halodol and thorozin, both potent drugs as tranquilizers. Dr. Wray says he had not seen her since 1974 and possessed no direct evidence that she was incompetent in 1980. He expressed the opinion that she appeared to be easily influenced by those close to her and would be susceptible to undue influence.

16. Another witness was Mrs. Lulu Milton, aged 75, who knew the Sapp family well and saw Mrs. Christ regular. She was aware that at one time there had been some difficulty between Mrs. Christ and Mr. Moreland, manifested in some estrangement between them. She

also testified that during his lifetime, Mr. Christ was abusive and even violent toward his wife.

17. Mrs. Sandra Fletcher, one of the contestants, stated that she considered herself closer to Mrs. Christ than Mr. Moreland; that she visited Mrs. Christ several times while she was in the nursing home but that Mrs. Christ did not seem to recognize her or possess her mental faculties. She related that sometime prior to August 22, 1986 she received a telephone call from Mrs. Marjorie Morgan, one of the $500 legatees in the Christ will and sister of Mr. Hugh Moreland, requesting a meeting with Hugh and Mrs. Morgan with a view to settling the law suit. Such a meeting took place but produced no

settlement. It seems to have involved some disputes about the disposition of other properties derived from the estate of their grandfather, Dr. H.H. Sapp. In the course of the discussion, Mr. Moreland remarked that anything he got from the estate he planned to share with his sister, Mrs. Morgan.

18. It appears that Mrs. Vandergrift and Dr. Sapp, Jr. had residences some distance from Gadsden County during the periods involved here and thus had little opportunity to give as much attention to Mrs. Christ as did Mrs. Marjorie Moreland, Hugh Moreland, Marjorie Morgan and Sandra Fletcher. During his guardianship and perhaps even before Mr. Moreland took steps to

repair and maintain the homeplace of Mrs. Christ. Mrs. Fletcher testified that though her husband, Mr. Hentz Fletcher, was in a business supplying house repair materials and in house construction and renovating business, no contact was made with them by Mr. Moreland to confer on repairs or seek their participation in the projects.

19. Dr. Reddick, who was deceased at the time of trial, had given a deposition during his lifetime which was published at the trial. He was very positive in his conclusions that Mrs. Christ knew the extent of her property and the identity of her relatives and that she was firm in her desire to bequeath her property as she did. He also stated that Mrs. Christ was

fully aware that the will she executed was different from one she had executed some time previously and was changing the dispositions her earlier will had provided.

20. There are certain well established rules of law that pertain to the right to execute a will and to have it enforced in the courts; the necessity of testamentary capacity of the testator or testatrix; the effect of undue influence upon the maker by one benefiting from a bequest who also occupies a confidential relationship with the maker; and certain presumptions arising out of an adjudication of incompetency prior to the execution of a will and of undue influence of one occupying a confidential relationship.

21. Under the Probate Code, any person 18 or more years of age who is of sound mind may make a will. F.S. 732.501 (Emphasis supplied), "A will is void if the execution is procured by ....undue influence...." F.S. 732.5165. A testator is of "sound mind" if" ... at the time of executing his will...(he has)...sufficient mental capacity to comprehend perfectly the condition of his property, his relations to those who are the objects of his bounty, and the scope and bearing of the provisions of his will. He must also have sufficient active memory to connect in his mind, without prompting, the particulars or elements of the business to be transacted, and to

hold them in his mind for a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator with sufficient mental power to do these things is a person of sound mind and memory and is competent to dispose of his estate by will." Sec. 128, Decedent's Property, 17 Fla. Jr. 2nd 481; Hamilton v. Morgan (1927) 93 Fla. 311, 112 So. 80. See also Heasley, et al v. Evans, et al (Fla. 2nd DCA 1958) 104 So. 2d 854, which also holds; "Mere old age, physical frailty or sickness, failing memory, or vacillating judgment are not inconsistent with testamentary capacity if the testator possessed

the testamentary prerequisites, particularly where the will appears to have been made under fair circumstances and was not unnatural in the disposition of the property." In accord: Butler v. Williams (Fla. 2nd DCA 1962) 141 So. 2d. 4; In re Dunson's Estate, Fla. 2nd DCA 1962) 141 So 2d 601

22. The Dunson case, supra, also states: "The right to dispose of one's property through the instrumentality of a will is highly valuable, and it is the policy of the law to hold a will good whenever possible. See, Skelton v. Davis, Fla. App. 1961, 133 So. 2d. 432; In re Donnelly's Estate, 1938, 1937 Fla. 459, 188 So. 108. The law has prescribed no limit as to the age beyond which

one may no longer dispose of his property by will, but instead the will of an aged person has been said to be the object of tender regard. In re Starr's Estate, 1935, 125 Fla. 536, 170 So. 620..."

23. It is clearly established in our law that when one has been adjudicated mentally incompetent there is a presumption that such condition continues. However it is a rebuttable presumption as it is a question of fact. Chapman v. Campbell (Fla. 2nd DCA 1960) 119 So. 2d. 61. This case also states: "The law is well settled that if the testator had capacity at the time the will is made, his past or future condition is immaterial.... In other words,

there may be a lucid interval even when a person is under adjudication of insanity or incompetency when the will is made." In Murrey v. Barnett National Bank (Fla. 1954) 74 So. 2d. 647, the Court, in upholding a trust agreement executed by an 86 year old woman who was an inmate of a convalescent home, affirmed a dismissal of a suit to set the instrument aside on the asserted ground that the trustor was senile and unable to understand the nature and effect of the agreement. The Court observed that even a lunatic may make a will or sale of property in a lucid interval.

24. It is perhaps appropriate to pause here and comment upon the presumption of

testamentary incapacity of one who prior to execution of a will has been adjudicated incompetent, and the presumption of undue influence of one in a confidential relationship when that person becomes a favored legatee under a will executed by a person within that relationship. That such presumptions exist is clear, and the evidence indicates that they arise in this case. Much has been said of burden of proof, shifting burden of proof and other procedural concepts to be observed. However, the ultimate result is that the proponent of the will is under a duty to offer evidence to sustain the will and refute the presumptions, with opportunity to contestants to offer evidence to

the contrary. The duty of the Court is to resolve the issues on the prevailing weight of the total evidence. This trial has proceeded in recognition of these principles.

25. The Court is of the view that the greater weight of the evidence establishes that at the time Mrs. Christ executed the will offered for probate in this case she was of "sound mind" under our probate statute in that she had the liability "to mentally understand in a general way the nature and extent of the property to be disposed of,"... and of her "relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as

executed...." Such were the standards set forth in Skelton v. Davis, Supra, which also observed that the making of a will does not depend on a "sound" body, but a "sound" mind. The care and steps taken by Mr. Curry and Dr. Reddick to inquire into Mrs. Christ's lucidity and understanding as a prelude to the formal execution of her will are, along with other evidence, convincing of the existence of her testamentary capacity. Wills, especially those of older persons, should be upheld if possible. Here the Court finds abundant support for sustaining the will as against a challenge to the testamentary capacity of the testatrix.

26. Resolution of the mental capacity issue does not dispose of the assertion of undue influence on the part of Hugh Moreland on the testatrix in view of his fiduciary relationship as guardian of her property and his closeness otherwise in dealing with her. Such relationship does raise a presumption of undue influence which must be effectively rebutted by evidence in order to prevent the will from failing because of such circumstances. It has been said that to set aside an instrument on the ground of undue influence such must be shown by clear and convincing proof. Murrey v. Barnett National Bank, supra. In re Dunson's Estate, supra, holds that for a will to be invalidated

upon the ground of undue influence, "the undue influence charged must be such that it amounts to overpersuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and will power of the testator. Mere affection, kindness, or attachment of one person for another may not of itself constitute undue influence."

27. In the case of In re Estate of Robertson, (Fla. 3rd DCA 1979) 372 So. 2d 1138 the testatrix was a 90 year old widow whose lineal descendants included a granddaughter and two grandsons. Her last will and a codicil to it devised all of her estate to the granddaughter. The grandsons

sought revocation alleging undue influence of the beneficiary. The evidence indicated that the testatrix spent most of her last years living with the granddaughter and she had expressed to others a desire to give a power of attorney to the granddaughter. The Court found that the evidence sufficed to permit an inference of a confidential relationship between testatrix and granddaughter, but found there was no evidence that the granddaughter "actively procured the will." The testatrix selected the attorney to draft the will who arranged the execution and audio-video taping of it. Her attending physician witnessed the execution. The evidence showed she understood the extent of her estate

and the object of her bounty. The granddaughter at no time had possession of the will or codicil and had no knowledge of their contents until testatrix's death. The Court recognized the rule of a presumption of undue influence if a substantial beneficiary occupies a confidential relationship with a testator and is active in procuring the contested will. It was said: "The mere existence of a confidential relationship between the testator and a principal beneficiary does not raise a presumption of undue influence so as to impose the burden upon that beneficiary of establishing that the execution of the will was not obtained by undue influence." The gist of the ruling made in that

case is that even if a confidential relationship exists there must also be the element that the beneficiary was engaged in "active procurement" in the execution of the favored terms in a testamentary document. In the case of In re Estate of Berte, Fla. 4th DCA, (1984) 450 So. 2d 236, a beneficiary under the will had been the housekeeper maid of testatrix who drove her to the attorney's office to execute the will. The Court held that the evidence was insufficient to support a finding that beneficiary actively procured the will and that presumption of undue influence did not arise despite close confidential relationship between testatrix and beneficiary. This case cites In re Estate of

Carpenter, (Fla. 1971) 253 So 2d. 697, in which certain criteria were given in determining "active procurement" of a will. These are:

(1) Presence of beneficiary at execution of the will;

(2) Presence of beneficiary on those occasions when testator expressed desire to make a will;

(3) Recommendation by beneficiary of an attorney to draw a will

(4) Knowledge of contents of will by beneficiary prior to execution;

(5) Giving instructions by beneficiary on preparation of will;

(6) Safekeeping of will by beneficiary subsequent to execution.

28. As stated above, for a will to be invalidated for undue influence, such influence must amount to "overpersuasion", "duress", "force", "coercion", or

"artful or fraudulent contrivance" to such an extent that here is a "destruction" of free agency and will power of the testator. These terms refer to conduct associated with dishonesty, intimidation, deception and connivance to the extent that a testator is enticed to abdicate free agency and will power and pursue a course clearly at variance with the natural inducements in making testamentary disposition of one's estate. It is not to be equated with mere affection, kindness, or attachment of one-person for another.

29. The evidence does show a close relationship between Mrs. Christ and her sister, Mrs. Moreland, and Mrs. Moreland's son, Hugh. As Mrs. Moreland testified

Mrs. Christ was her "baby sister" and she felt protective of her. In Mrs. Christ's difficulties with her husband and the mishandling of her property as well as her own condition of health it seems clear that a guardianship was practical and necessary and Mr. Moreland, the male relative closest at hand, was a natural choice. The evidence does indicate that Mr. Moreland and his mother were instrumental in persuading Mrs. Christ to make a will. However it is only speculation that either of them suggested whom she would make beneficiaries and to what extent. Even, as was quite probable, Mrs. Moreland knew from her sister what the terms of her will would be, there is nothing to evidence that

such came other than from Mrs. Christ' own decisions uninfluenced elsewhere. Mr. Moreland may have to a degreee actively procured the execution by Mrs. Christ of "a will", it is not established that he in any way hinted or suggested or performed any artful or fraudulent contrivance that he be the principal beneficiary or the personal representative. Referring to the criteria of In re Estate of Carpenter, supra, it clearly is evidenced that he was not present at the execution of the will; there is no evidence that he knew the contents of the will until after Mrs. Christ's death; and the safekeeping of the will was not by him but by the attorney, Mr. Curry. With regard to the criteria of

recommendation of an attorney to draw the will, it is perhaps inferable that Mr. Moreland expected and probably mentioned Mr. Curry's name as a suitable lawyer to draw the will. It would have been unnatural for Mrs. Christ to seek any other attorney in view of services and consultations had with him in other matters involving actual or contemplated legal proceedings in behalf of Mrs. Christ. The criteria of presence of beneficiary on occasions when testatrix expressed a desire to make a will is not pertinent to this case. There is no evidence of such occasions. Also there is no evidence that he gave any instruction to Mrs. Christ on the contents of her will. Evidence of

prior difficulties between Mrs. Christ and Mr. Moreland appear to have been long past and not significant in the later relations.

30. It is concluded that the evidence is persuasive by its greater weight that neither Mr. Moreland nor his mother in his behalf were ever engaged in active procurement of the terms of the will executed by Mrs. Christ. The evidence falls short of revealing a conniving scheme, over persuasion or any fraudulent contrivance on the part of the Moreland's to capture the favored beneficiary role which was incorporated into the will.

31. Mrs. Christ's selection of beneficiaries was not unnatural as would have been the

case of prefering a clear outsider to one's closest relatives or others to whom bounty would be logical. This was not a case of disinheriting a child or grandchild in favor of others with less affinity. This is a case of providing a legacy to each niece and nephew equally except in the instance of Mr. Moreland. However it was Mr. Moreland who had been attentive to her in her difficulties and who had succeeded in recovering moneys which were the major portion of estate's assets. It was not unnatural that she should choose to favor him over the others. This is not a rebuke of her other nephew and her nieces. She did remember each of them in equal fashion in more than just a

token amount. Truly they may have expected more in the light of the total worth of the estate but the fact that a beneficiary does not get what was expected is no a ground to set aside a testamentary disposition. Murrey v. Barnett National Bank, supra.

32. In view of the foregoing it is accordingly further

ORDERED AND ADJUDGED, that the Petition for Revocation of the Last Will and Testament of Helen Sapp Christ be and the same is hereby denied and dismissed. The appointment of personal representative is hereby confirmed and the probate proceedings shall move toward final administration and disposition according to law.

DONE AND ORDERED this

13th day of November, 1986.

BEN C. WILLIS
Circuit Judge

Copies furnished to:

Hal A. Davis, Esquire
John K. Folsom, Esquire

IN THE DISTRICT COURT OF
APPEAL, FIRST DISTRICT,
STATE OF FLORIDA

SANDRA SAPP FLETCHER, SYLVIA SAPP VANDERGRIFT AND JAMES WINSTON SAPP,
Appellants,

v.

ESTATE OF HELEN SAPP CHRIST,
Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: BQ-385

Opinion filed June 1, 1987.

On appeal from the Circuit Court for Gadsden County.

Hal A. Davis, Quincy, for Appellant.

John K. Folsom of Vickers & Muldoon, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

BOOTH, C.J., ERVIN and SMITH, L., JJ., CONCUR.

DISTRICT COURT OF APPEAL,
FIRST DISTRICT

Tallahassee, Florida 32399
Teoephone No.(904) 488-6152

DATE: July 6, 1987
CASE: BQ-385

SANDRA SAPP FLETCHER, et al vs.
ESTATE OF HELEN SAPP CHRIST

Appellant/Petitioner
Appellee/Respondent

ORDER

Motion for rehearing and for rehearing en banc DENIED.

[S E A L]

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following: Hal A. Davis, Esq., Quincy, Florida; John K. Folsom, Esq., Tallahassee, Fl

S/ Karen Roberts
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

FIRST DISTRICT

SANDRA SAPP FLETCHER, et al.,

Appellants,

vs. CASE NO.: BQ-385

ESTATE OF HELEN SAPP CHRIST,

Appellee.

MOTION FOR REHEARING AND FOR REHEARING EN BANC

Come now, the Appellants, by their undersigned attorney and move for an order granting a rehearing or, alternatively, a rehearing en banc, upon the following grounds:

1. This Court per curiam affirmed the Trial Court's ruling with no opinion or reference to a controlling case.

2. The discrepencies between the facts revealed in the unchallenged record and the fact6s recited by the Trial Court as the basis for his opinion and ruling unequivocally demonstrate the ruling was based upon a misapprehension of the facts.

3. The per curiam affirmance deprives these Appellants of further review before the Florida Supreme Court, especially regarding the issue defining the permissible limits of the practice of law.

4. Appellants urge this Court to grant a rehearing or rehearing en banc to resolve

important issues of conflicts which the adverse per curiam ruling of this Court created with controlling principals in other cases in this Honorable Court as well as with other Courts.

5. If rehearing is not granted and a reviewable opinion not rendered the Appellants will be denied due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution and by Section 9 of Article I of the Constitution of the State of Florida because, among other things, there will be no access to review by the Supreme Court of Florida, even though it has an effect on the practice of law.

6. This Court stated in Clements v. Plummer, 250 So2d 287 (Fla App DCA 1 1971), that

"If a judgment is manifestly against the weight of the evidence or contrary to the legal effect of the evidence, the appellate court has the duty to reverse the judgment."

The Trial Court here was faced with no proof of the decedent's knowledge of the extent of her property, three presumptions of undue influence because of the confidential relationships between Helen and Mr. Curry, Helen and Hugh and Rosalie and Helen. The Court was also faced with the irrebuttable presumption leading to the ultimate conclusion that Hugh knew of the will through Mr. Curry. That Mr. Curry was representing Hugh when he drew and had executed the will of Helen is clear from the evidence.

7. In Heath v. First National Bank in Milton, 213 So2d 883 (Fla App DCA 1 1968), this Court held that:

> "While an appellate court will not disturb the findings of fact by the trier of facts, if there appears to be sufficient competent evidence to support such findings; but if the weight and competency, both, of the evidence is clearly contrary to the findings of fact as determined by the trial court, then it is not only the authority, but also the duty of the appellate court to so find and reverse the trial court."

In that case a bank was foreclosing a mortgage on a homestead given to secure a loan to a business owned by the husband/mortgagor. The wife also signed but both claimed there was only one witness even though the mortgage showed two subscribing witnesses. This Court refused to accept the mortgage as valid even

though facially so, because the necessary knowledge and intent to alienate the homestead was not shown and the presence of the necessary witnesses' was not proved.

8. The same is true here as the evidence is insufficient to show:

a. Lack of the presumed undue influence,

b. Knowledge of the nature and extent of her property by the testatrix, reinforced by the presumption of incompetency;

c. Lack of mistake and confusion because of the evidence that testatrix thought she had a prior will and thought the law required her to make a will, which two evidentiary failures were intensified by the presumption

previously mentioned of undue influence and continued incompetency.

9. Additionally the per curiam affirmance has the effect of condoning the practice of conflicting representations by an attorney.

10. The case has had wide notariety in the area and involves families whose residence in North Florida has pioneer status and many are aware of the discrepencies between the facts and the findings and rulings of the learned trial judge rendering the judgment on review without evidentiary foundation.

11. This situation is comparable to the "Vindictive prosecution" cases under the Fourteenth Amendment where the

United States Supreme Court held that the appearance of unfairness is intolerable to due process even though not the complained of action is actually not based upon an improper motive. North Carolina v. Pearce, 395 US 711, 23 LEd 2d 656, 89 S Ct 2072.

12. Here, there is the appearance that the evidence is not material to a just and legal decision leaving those adversely affected with the impression that they would have lost regardless of the evidence. The fact that this may not be true is immaterial to due process.

13. The decision is of exceptional importance in that it:

a. has the impact of defining the permissible scope of conflicting multi-client

representations by a single attorney (a due process violation within the process), and

b. has the effect of approving Trial Court decisions based upon a misconception of the law and the evidence.

I express a belief, based on reasoned and studied professional judgment, that the panal decision is of exceptional importance.

Respectfully submitted,

S/Hal A. Davis
HAL A. DAVIS
7 W. Washington Street
Quincy, Florida 32351
904-627-7587

Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to JOHN K. FOLSOM, Esq., Attorney for Appellee, 424 E. Call Street, Tallahassee, Florida 32351, this 16th day of June, 1987.

S/Hal A. Davis
HAL A. DAVIS

87-808 (3)

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SANDRA SAPP FLETCHER, SYLVIA SAPP VANDERGRIFT AND JAMES WINSTON SAPP, JR.,

Petitioners,

vs.

ESTATE OF HELEN SAPP CHRIST,

Respondent.

ON WRIT OF CERTIORARI
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

BRIEF FOR RESPONDENT

JOHN K. FOLSOM
122 South Calhoun Street
Tallahassee, Florida 32301
(904) 224-7192

Counsel for Respondent

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STATEMENT OF THE CASE

Petitioner's statement of the case is so sketchy and so taken out of context as to be completely misleading. The facts of the case were accurately stated by the trial court in its final judgment entered on November 13, 1986 and set forth in full in petitioner's appendix (A). Respondent adopts the trial courts statement of facts as his statement of the case.

RESPONSE TO REASONS FOR GRANTING THE WRIT

There were only two issues ever involved in this case which were set forth by the trial court in its final judgment as follows (A4):

> "A. Whether testatrix did possess the minimum testamentary capacity in order for her will to be valid; and
>
> B. Whether Hugh Moreland, the principal beneficiary under the will, exerted undue influence on the testate in the execution of the will."

When one has been adjudicated mentally incompetent, there is a presumption that such condition continues. However, it is a rebutable presumption as it is a

question of fact. Chapman vs. Campbell (Fla. 2nd DCA 1960) 119 So. 2nd 61. Murrey vs. Barnett National Bank (Fla. 1954) 74 So. 2nd 647.

John Shaw Curry, the attorney who drafted Helen Christ's will, knowing of her incompetency, contacted her treating physician, Dr. Hilliard R. Reddick about her lucidity and requested Dr. Reddick to contact him at a time when he felt Mrs. Christ was particularly lucid so he could arrange to have the will which he was drawing to be again explained to her and executed if it appeared she wanted to do so. Record (R), (R-66). After several weeks, Dr. Reddick contacted Mr. Curry with the information that Mrs. Christ appeared to be fully cognizant and arrangements were

made for Mr. Curry to meet Mrs. Christ with Dr. Reddick at the Gadsden Nursing Home (A 11). Dr. Reddick, who was deceased at the time of trial, had given a deposition during his lifetime which was published at the trial. He was very positive in his conclusions that Mrs. Christ knew the extent of her property and the identity of her relatives and that she was firm in her desire to bequeath her property as she did. (A 19). Dr. Reddick had been Mrs. Christ's treating physician from July 12, 1976 until August 31, 1981. He had been seeing Mrs. Christ on at least monthly intervals, if not more often, since she had been in the nursing home. He was a member of the American Board of Family Practice and his specialties were

family practice, internal medicine, pediatrics, obstetrics, gynecology, general surgery and psychiatry. Deposition (D-5). Dr. Reddick was a subscribing witness to Mrs. Christ's will. Margaret Suber, a Licensed Practical Nurse in the nursing home was also a subscribing witness to the will and testified that Mrs. Christ appeared to understand what was going on and to understand the terms of her will and made intelligent responses about questions directed to her about the will and that she was having a very good day on the day that the will was signed. (R-13) (A-14).

John Shaw Curry, who was also present at the time of the signing of the will, testified that he was never in doubt that Mrs. Christ was fully lucid, aware of the extent of

her property and the terms incorporated in the will fully comported with her wishes. (A-13) (R-70).

Also testifying at the trial was Samuel A. Thompson, the administrator of the Gadsden Nursing Home at the time Mrs. Christ signed the will. He stated he knew Mrs. Christ as a patient, that she was friendly, but sometimes became upset, but always appeared to be aware of her surroundings and was positive in expressing her wants. He stated in all his contacts, she seemed to be lucid. (A-14). It is significant that not one single witness nor one shred of evidence was proferred at the trial to show that Mrs. Christ was not competent at the time of the execution of her will.

The trial court held:

"25. The court is of the view that the greater weight of the evidence establishes that at the time Mrs. Christ executed the will offered for probate in this case she was 'of sound mind' under our probate statute in that she had the ability to 'mentally understand in a general way, the nature and extent of the property to be disposed of'....and of her 'relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed... Such were the standards set forth in Skelton vs. Davis, Fla. App. 1961, 133 So. 2nd 432, which also observed that the making of a will does not depend on a 'sound' body, but a 'sound' mind. The care and steps taken by Mr. Curry and Dr. Reddick to inquire into Mrs. Christ's lucidity and understanding as a prelude to the formal execution of her will are, along with other evidence,

> convincing of the existence of her testimentary capacity. Wills, especially those of older persons, should be upheld if possible. Here the court finds abundant support for sustaining the will as against a challenge to the testamentary capacity of the testatrix." (A-27).

As to whether Hugh Moreland, the principal beneficiary under the will, exerted undue influence on the testatrix and the execution of the will, again it is significant that no testimony or proof was proferred at the trial that Mr. Moreland in any way attempted to influence Mrs. Christ in the execution or the procurement of her will. The trial court held:

> "...it is not established that he in any way hinted or suggest-

ed or performed any artful or fraudulent contrivence that he be the principal beneficiary or the personal representative. Referring to the criteria of In re Estate of Carpenter, (Fla. 1971) 253 So. 2nd 697, it clearly is evidenced that he was not present at the execution of the will; there is no evidence that he knew the contents of the will until after Mrs. Christ's death; and the safekeeping of the will was not by him, but by the attorney, Mr. Curry..."(A-37).

The court further held:

"30. It is concluded that the evidence is persuasive by its greater weight that neither Mr. Moreland nor his mother in his behalf were ever engaged in active procurement of the terms of the will executed by Mrs. Christ. The evidence falls short of revealing a con-

> niving scheme, over-persuasion or any fraudulent contrivence on the part of the Morelands to capture the favored beneficiary role which was incorporated into the will." (A-39)

The thrust of petitioner's argument seems to be that the trial court misweighed the evidence. The foregoing quotations of testimony demonstrate that there was ample, competent testimony to support the trial court's finding of competency and to rebut any presumption of incompetency resulting from her prior adjudication of incompetency. In Ahlman vs. Wolf (3rd DCA, 1986) 483 So. 2nd 889, the court emphasized the futility of appealing

undue influence decisions solely on the basis that the trial court misweighed the evidence. It held that the evaluation of conflicting evidence is the function of the trial court. It is the trial court, as trier of fact, that must weigh the evidence, assess the credibility of the witnesses and determine whether the evidence establishes the occurence of undue influence. In Zeller vs. Zelnick, (4th DCA, 1985) 476 So. 2nd 299, the court emphasizes the point that the burden of proof in a will contest remains for the party challenging the will throughout the case, regardless of whether the Carpenter (supra) presumption is established, and citing In re Estate of Davis

(4th DCA 1984) 42 So. 2nd 12.

Petitioner cites Sears, Roebuck & Co. vs. Stansbury, 374 So. 2nd 1051 (Fla. 5th DCA 1979) as supporting the proposition that the law irrebutably presumes that confidences between a client and attorney were passed by the lawyer to other clients of the lawyer. This position is stated on page 16 of petitioner's petition and again is used to support his arguments on pages 18 and 22 of his petition. Such a statement is preposterous on its face and there is no way with even the most strained construction of SEARS that such a conclusion could be reached. The actual holding of SEARS was in the following

language:

> "The existence of the attorney-client relationship raises an irrefutable presumption that confidences were disclosed (by client to attorney)...Further, the presumed access of a partner to confidential information imputes knowledge of that information to others in his firm."

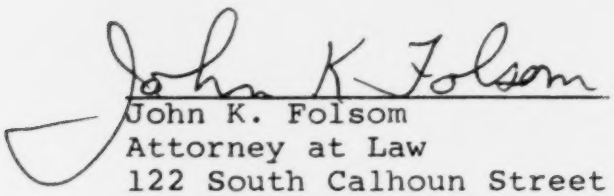
Petitioners' misstatement of the holding in Sears was pointed out by respondent in his answer brief filed in the First District Court of Appeals in the State of Florida and was again pointed out by respondent in his response to petitioner's motion for rehearing and for rehearing en banc, when petitioner for the second time misstated such holding. For peti-

tioner now to knowingly and willfully misstate to this court the holding in that case after the misstatement had twice been brought to his attention, and base most of his premise in his brief on that misstatement is mind boggling!

CONCLUSION

There simply is no federal question of law presented by petitioners petition for Writ of Certiorari under the 14th ammendment or otherwise. The law of testamentary capacity and undue influence is well settled and correctly applied. There was no conflict of facts. Petitioners simply express discontent at the trial court's weighing of the evidence which not only is not a federal question but not an appealable question.

Respectfully submitted,



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